

# What Is a Family?

## A Fred Friendly Seminar

**I**n December 2004, the AOC Center for Families, Children & the Courts sponsored a Fred Friendly Seminar on parentage issues at its annual *Beyond the Bench* conference. More than 20 years ago, Fred Friendly, now deceased, started the seminars, which use the Socratic method to explore complex and vital issues challenging society. A skilled moderator, using a hypothetical case history, challenges panelists who have not been given any prior information about the hypothetical, to decide how to act in complicated situations where the “right” choices are not obvious or easy.

*In the Beyond the Bench hypothetical, 4-year-old twins Ashley and Ben are found in a homeless shelter with their mother, Diane, who has a severe substance abuse problem rendering her incapable of caring for the children. When the children are identified by the “system,” a search begins for a new family and home. Will their grandparents, loving and able but of very modest means, meet the standards necessary to serve as the children’s foster parents? Will Diane’s lover, who raised the children as a parent until a recent breakup, be given custody, rather than the children’s aunt and uncle? Does it matter whether Diane’s partner was a man or a woman? Does California law provide clear answers? And will a California court’s decisions in this case be followed by an out-of-state court?*

**MODERATOR:** This morning’s discussion is about Ashley and Ben, two beautiful 4-year-old twins, a girl and a boy. Brittany Pettigrew, we want to talk to you about Ashley and Ben. They are here because their mother, Diane, lives in shelter care. She suffers from a severe drug abuse problem and can’t care for them and is looking for foster care. And so we come to you to get a sense about what these children should expect. Tell us, Brittany, about your first reaction to these two 4-year-old children and what you will need to do.

**PETTIGREW:** My first step would be to ask if there is family or friends of family who could possibly take the children in.

**MODERATOR:** I’m Ben, the 4-year-old. If you were talking to me, tell me about this experience. What am I going through?

**PETTIGREW:** All right. Ben, your mom is having some problems, and she wants some help taking care of you. And so we want to take you to a place where you’ll still be able to visit with your mom.

**MODERATOR:** You’re taking me away from my mom?

### MODERATOR:

**MR. CHARLES J. OGLETREE**, *the Jesse Climenko Professor of Law at Harvard Law School and a prominent legal theorist*

### PANELISTS:

**HON. PATRICIA BRESEE**, *Commissioner (Ret.), Superior Court of California, County of San Mateo*

**MR. FALOPE FATUNMISE**, *Director, Edgewood Center for Children and Families, Kinship Support Network (San Francisco)*

**HON. ERNESTINE GRAY**, *Chief Judge, Orleans Parish Juvenile Court (New Orleans)*

**HON. HANNAH-BETH JACKSON**, *35th Assembly District, California State Assembly*

**MS. MARJORIE KELLY**, *Former Deputy Director, California Department of Social Services*

**HON. DAN LUNGREN**, *Representative-elect, 3rd Congressional District, and former Attorney General of California*

**MS. MARTHA MATTHEWS**, *Director, Domestic Violence Clinic, and Assistant Clinical Professor of Law, University of Southern California Law School*

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**MR. MICHAEL McCORMICK,**  
*Executive Director, American Coalition for  
Fathers and Children (Washington, D.C.)*

**HON. JAMES MIZE,** *Judge of the  
Superior Court of California, County of  
Sacramento, and President, California  
Judges Association*

**MS. BRITTANY PETTIGREW,** *Child  
Welfare Supervisor, Alameda County Social  
Services Agency*

**MR. IAN RUSS,** *Family Counselor and  
Court Custody Evaluator (San Diego)*

**MR. GARY SEISER,** *Senior Deputy  
County Counsel, Juvenile Dependency  
Division, San Diego County*

**MS. JANET SHERWOOD,** *Juvenile Law  
Attorney (Corte Madera)*

**PETTIGREW:** Yes.

**MODERATOR:** Can Ashley come with me?

**PETTIGREW:** Yes. Both of you are going to go and live in a different home with what we call a “foster parent,” who is a person who takes care of children who can’t live with their parents right now. And we’re going to try to help your mom, and we’ll try to keep you in as much contact as possible so she can see you and talk to you on the phone.

**MODERATOR:** Tell me, Brittany, and tell this audience, is this agonizing for you?

**PETTIGREW:** Yes, because before I talk to a child, I usually have a written report or something in front of me that I can look at, and I might make a couple of phone calls ahead of time to understand better what I’m walking into.

**MODERATOR:** Let me ask you, Ian Russ. A couple of months ago these children were in a stable relationship with two parents, two loving parents. And then Diane’s drug abuse problem became so significant that they split and she left with the children, and now they’re in a position to be considered for foster care. Tell us what these children are going through—what’s happening here?

**RUSS:** These children are going through confusion because they can’t understand some of the words, they don’t understand the process. All they understand is what is immediate and present in their lives. They’re talking with strangers. They’ve probably been taught by their parents not to talk with strangers. They’re afraid they could get their mother into more trouble. They don’t know what to say and what not to say, and they’re probably terrified about not being with Mom and not being with Dad.

**MODERATOR:** What is it that they need right now?

**RUSS:** They need security and they need a sense of constancy. They’re going to need contact with their mom. I don’t know what happened with Dad. There’s extended family. Extended family can fill in a lot of that along the way. But they need a consistent sense of warmth and loving in their lives.

**MODERATOR:** And stability—I assume you’re trying to get some stability and some permanency?

**RUSS:** Yes, but stability is difficult because as they’re going off to foster care, they’re moving into a house with all new rules, all new people; they don’t know how things happen, and it’s a very unstable world unless we can find a family member to do it.

**MODERATOR:** Well, Falope Fatunmise, let me ask you this. We have been unable to find the other parent. But Diane has been able to put you in touch with her parents, the grandparents of Ashley and Ben. And these are healthy grandparents, but they are of very modest means. They’re living on a fixed income, on social security. What’s your sense about whether we could think about these grandparents’ being the responsible parents to take care of Ashley and Ben?

**FATUNMISE:** Ideally, it appears that those grandparents may be the most logical step for those kids. But I have two questions. Are these kids in formal foster care at this point? Has 48 hours elapsed?

**MODERATOR:** We want to get them in foster care. We have loving grandparents. They've known them, they've seen them over holidays, they have a warm relationship—so it's done, right?

**FATUNMISE:** Well, if they're going to be placed with those grandparents, they will have to go through a licensing process in order for those kids to officially reside in their home. That will require a criminal background check of not only those grandparents but anybody else who resides at or uses that address. So if Grandmother did something 20 years ago, it's going to come out. As far back as she's been living, actually.

**MODERATOR:** Forty years ago? Fifty years ago?

**FATUNMISE:** Yes.

**SEISER:** Which is why Brittany is going to be talking to the mom and saying, "You know, if you take these children and put them into the system, into the dependency system, you're going to lose control."

**MODERATOR:** Well, Mom can't take care of them right now.

**SEISER:** I understand that, but in talking with her, Brittany's going to be saying, "Hey, Mom, let's see if we can do this informally, let's see if we can do this voluntarily."

**MODERATOR:** Tell me, what are the hurdles? They have no criminal record. What next?

**FATUNMISE:** Now the house has to go through an inspection. These are two kids of a different gender—

**MODERATOR:** The house is beautiful, it's well kept; this is a terrific house.

**FATUNMISE:** Yes, but it has to have a number of bedrooms for those kids to sleep in. They can't sleep in the same bedroom with those grandparents.

**MODERATOR:** These are two 4-year-old twins.

**FATUNMISE:** They can't sleep in the living room; they can't sleep in the dining room either.

**MODERATOR:** They can't sleep in the same bedroom?

**FATUNMISE:** At 4 years old they can sleep in the same bedroom. But if they get to be 5 years old, they will have to have separate bedrooms.

**MODERATOR:** Help me, Brittany. Help me here.

**PETTIGREW:** That's right. When you're talking about a formal foster-care approval process, there are regulations that mirror those of licensure. But when you're talking about approving a relative or a friend of family, I look for any possible, reasonable exemption that I can find in order to preserve the family connection.

**MODERATOR:** What's the reasonable one here?

**PETTIGREW:** "Reasonable" meaning that the benefit of placing the children with the caregiver continues to outweigh the cost of finding the exemption.

**MODERATOR:** Well, these children have come to the right place, because the grandparents just have one bedroom, right? But the great news is that they have a foldout couch in the living room. So we're good to go, right?

**PETTIGREW:** For the most part, yes. We do have to also look at child protective services history, which is separate from criminal history.

**MODERATOR:** But the grandparents are on a fixed income; they're going to need financial assistance. They can get it, right?

**PETTIGREW:** Not necessarily. Approval of a placement is separate from the issue of eligibility for funding.

**MODERATOR:** Okay, but we have everything. We have a loving set of grandparents. We have two grandchildren who want to be there. We have a nice clean, you know, immaculate home. We've got separate places for the grandparents and grandchildren to sleep in.

**PETTIGREW:** Well, if they meet the requirements and I can get exemptions, then I don't have a problem with approving the home. But eligibility for financial assistance is a different process.

**MODERATOR:** I'm worried that if we start talking about going through all this red tape, you might even separate these children. Is that one of the risks

that we're facing? We've got loving grandparents. The grandchildren love these grandparents. We've got a home. It's not ideal. But it's ideal for them. It's not ideal in terms of the federal and state red tape.

**PETTIGREW:** The reality of our situation is that if you're talking about a formal foster-care situation, every home has to be approved prior to the child's going there. So that could necessarily mean that a child will have to go to an emergency foster-care situation pending the approval of the home. And if there is no available emergency foster-care situations at the time that can take both 4-year-old children and keep them together, even with any kind of waivers and exemptions we might get for that placement possibility, then it is possible that we might have to separate the twins temporarily.

**MODERATOR:** What do you mean "temporarily"?

**PETTIGREW:** The goal is to reunify them as quickly as possible in the same place.

**MODERATOR:** You still haven't answered my question. You're going to separate me and Ashley. Explain that to me, Ms. Pettigrew.

**PETTIGREW:** Ben, I cannot promise you that I will not separate you.

**MODERATOR:** We're being punished.

**BRESEE:** This is a frustration, I think, for anybody who sits on the bench and ultimately gets these cases. If Diane had made the arrangements on her own before she ever entered the treatment center and taken the children to the grandparents, the only thing that's missing is the money. Now there may be ways to receive some assistance for her family—if she's receiving benefits, then they may be able to. So I think what we're pointing up are the frustrations with "the system." I like to focus on the families' solving their own problems. And I certainly would want to know where that other parent was. And I would want to find out what Diane had in mind for these kids.

**MODERATOR:** Well, shouldn't the system focus on reasonableness?

**BRESEE:** I think so.

**MODERATOR:** I mean, here we've got the home, we've got the loving grandparents, and why are we drawing back because of this technical two-bedroom rule? Janet Sherwood?

**SHERWOOD:** Judge Bresee is right. If you can keep the kids out of the system, that's probably the best thing.

**MODERATOR:** But we've got Brittany. Brittany's going to work through this, right? Can't Brittany creatively interpret this?

**SHERWOOD:** Brittany can't creatively interpret this.

**PETTIGREW:** But I will admit that I am a very astute bureaucrat. Part of my role is to help families negotiate the system if they have no other options.

**MODERATOR:** I mean, who cares about the bedrooms? There's a bedroom for the grandparents. There are separate sleeping quarters for the two children. Why should that be an obstacle to keeping this family together? Marjorie Kelly, how would you respond to Brittany's dilemma here? What would you do in her circumstance?

**KELLY:** Part of the responsibility of the system is to work with families, to understand what they can do outside of the system, to help each other and to help themselves. And so, in this situation, efforts to track down the dad as the assumed preferential placement would be the obvious first avenue to pursue. And the second avenue is to say to Mom, "You can put those kids with the grandmother, go ahead and do it," just as my son can go to his grandparents without a judge's permission.

**MODERATOR:** My question is, are the social service people going to say, "I'm really going to try to figure out what's best for the children and try to navigate through this red tape"? It makes no sense to have this technical two-bedroom requirement.

**KELLY:** What you're actually hearing is how the system has become—and this is not a good term perhaps, but—perverted by the search for funding. And what Brittany is telling you isn't that she wants to do all these things to these children. She doesn't even necessarily want to make a case. What she's telling

you is, “I can get the grandparents more money if we make it a child welfare case and you meet all of these obligations and requirements.” However, one of the things that we’ve not spent enough time on is how we explain to relatives what the options are, maybe at a lower rate of money but that allow them to operate as a family, caring for each other—for example, how to apply for welfare, an option that may not provide as much money as a dependency foster-care arrangement. You don’t have to come into the system at all.

**MODERATOR:** All right. Judge Gray, welcome to California. Now, you’re from Louisiana. Sort this out for us.

**GRAY:** Well, quite frankly, if this case came to me, I would wonder why the agency is not taking advantage of what I heard they can do in this case. Since the children are 4, the regulation that is causing all these problems doesn’t apply to this case. It only applies if they’re older. So, if they came to me under this scenario, they would be in deep trouble because they haven’t placed the children because they are 4 and the bedroom issue is not an issue. Second, in Louisiana, we have the ability to do emergency certification of homes for a temporary period of time. We do that quite often. So I would want to know whether or not we could place these children with their grandparents, do an emergency certification of their home, let the children go there, and make sure the criminal record’s checked, all those things check out, and the children can stay there permanently. I think Marjorie has touched on something that is critically important. We don’t explain, in my opinion, to parents, grandparents, and relatives the negatives of foster care. We present this as a truly positive thing. And we don’t say to relatives and parents what are the downsides when the children get into foster care. Just because children go into foster care, they don’t come out necessarily well grounded, adult—skilled adults. And I think we need to say honestly to people this is not the panacea that you think it may be, and, because it is not, you need to make decisions that may be burdensome to you, it may be hard for you to keep these children on a fixed

income. But if you’re looking out in the future, this may very well be the best thing for the children. And people have to stretch, and I think we should ask relatives to stretch.

**PETTIGREW:** I want to say, though, that actually is a conversation that people repeatedly have. If a placement can be safely made outside of the foster-care system, we’re definitely going to try to take advantage of that. You can do it quickly, you can execute quickly. I mean, for us, it’s a lot more work to bring a child into the system than to find a safe alternative outside of our system. I do feel that we try, as much as we know, to explain what the options are.

**MODERATOR:** Martha Matthews, I’ve got some bad news for you and some good news for you. Grandpop had a stroke. But he’s fine. He’s recovering. But it’s clear that they will not be able to handle the burden of raising twin 4-year-olds. It just won’t work. The good news is that now we’ve found Chris.

Let me tell you about Chris. Chris is a wonderful person. Chris met Diane and, as they developed a relationship, Diane told him, “I’m pregnant by Mr. One-Night-Stand. I have no idea where he is or what he’s doing.”

And Chris said, “Diane, I love you very much. You should have the child (it turned out to be twins). I will support you.”

And that’s indeed what happens. Diane has the twins. Diane and Chris are living together. The twins call Chris “Dad.” Chris works and provides for them, and Diane is a stay-at-home mom. And so, that’s Chris’s status.

And let me ask you, Martha, what is Chris? Is he a very, very good friend? Is he the father? Under California law, what is Chris’s relationship to the children?

**MATTHEWS:** Well, it depends. I mean, if he’s held himself out as the father of those twins, if they think he’s the father, if he’s always acted as the father, he can assert himself to be what’s called a “presumed parent” under California parentage law. Even if he knows he’s not the biological father, as in the *Nicholas H.*<sup>1</sup> case, he could still be a presumed parent,



which means that he is someone the dependency system can work with as the other parent.

**MODERATOR:** Judge Bresee, how would you answer that question?

**BRESEE:** I would agree with Martha. And we do have the guidance of our Supreme Court in that case. I look to the child's perception of parentage. Whom does the child see as a father, a mother, two fathers, or two mothers, whatever the situation may be? And whenever possible, I trust the children.

**MODERATOR:** Great. Well, it seems all settled, right, Gary Seiser? We've got the judge and the lawyers, right? And so there's no problem. The Supreme Court has spoken.

**SEISER:** The main problem is that we're not going to call this man a "presumed father" until the court does. Because at this point he's an alleged father. And so on the dependency petition Brittany's going to call him an "alleged father," which will raise a red flag to the court to say, "Hey—we need to deal with paternity." And if the court finds him to be a presumed father, then we will treat him as a presumed father. But until that happens, he's an alleged father, which means he's not eligible for placement, his relatives are not eligible for placement as actual relatives.

**MODERATOR:** I'm worried, Judge. You told me this was all settled, and I felt very comfortable. Is Gary right?

**BRESEE:** Yes, Gary is right, but don't file the petition—

**MATTHEWS:** Just let the kid go live with him. I wonder where he's been the last couple of months, though. I mean, where was this guy?

**MODERATOR:** Looking for his children, and looking for Diane. She left.

**MATTHEWS:** If you find out about Chris, there doesn't need to be a dependency case in the first place. The kids can just go live with him.

**MODERATOR:** Janet Sherwood, any problem?

**SHERWOOD:** No, no problem. And I think Gary's only half right, by the way. I don't agree that his relatives would not be the children's relatives, because the

definition of *relatives* includes relation by blood or affinity. And I think we've got the affinity piece.

**SEISER:** The rule of court defines *affinity*, and it wouldn't include Chris's relatives until the court makes a determination.

**SHERWOOD:** And I think the rule of court is inconsistent with the statute, and, therefore, we ignore it.

**SEISER:** Ohhh—

**MODERATOR:** All right. Hannah-Beth Jackson, what's your sense about this? Chris is on the scene now. Problem solved or problem complicated?

**JACKSON:** I think that California law is moving in the direction of intentional parentage, and he clearly has held himself out as the father. I would have to agree to try to avoid the foster-care system and court system to the extent that you have a willing and capable parent. He clearly seems to come under that definition. And, unless and until there's some question that calls for the intervention of the court or a financial request that would then bring the system into play, I would agree that Chris is the man.

**MODERATOR:** Okay. What do you think about this, Michael McCormick? Good result?

**MCCORMICK:** I think that based on the facts and circumstances of the moment, it is a good result.

**MODERATOR:** At the moment? Uh-oh, there's a little hesitation in your voice. Why?

**MCCORMICK:** Well, I'm concerned about a child going into a foster-care system, being placed with grandparents, and down the road setting up an adversarial custody situation where the father is trying to get the children back from the grandparents. So the idea of avoiding the system initially is a very good idea and brings to mind that adage, "I'm from the government and I'm here to help." And I think we need to settle this outside of bureaucracy as much as we can.

**MODERATOR:** Dan Lungren, you're from the government and you are here to help, right? Tell this audience—we're working toward the right result here, right?

**LUNGREN:** Frankly, I don't know because I just find it strange that you have these people who claim they were living as a family, and one can go off with the two kids, the other one didn't find them for some time. That would suggest to me some instability. I don't know, just based on the facts, that there was a true father relationship with these kids. I don't have enough facts at this point to know exactly what I would do on this. And while I have seen the problems of foster care, I've also spoken to foster kids who, as much as they've had difficulty in foster care, have given me chapter and verse of the problems they had with their "parents." And in some cases, they would have been far worse off with those parents.

**MODERATOR:** You didn't draft these guidelines we talked about earlier, but is the Legislature trying to do something by setting up some clear guidelines that may frustrate all these caretakers?

**LUNGREN:** I think so. I mean, one of the comments made earlier was that so much seems driven by funding. And, unfortunately, many decisions in the Legislature are driven by budget. And you've just got so much budget to use, so you try to shoehorn your decisions within that. I believe the major thing that ought to be done here is an assessment of what's best for the kids involved, and in most cases that's trying to keep a family unit together. But we know there are some tremendous exceptions. So, as a legislator, you're trying to figure out what makes the most sense and where you want somewhat rigid rules and where you want to have discretion because you know there are fact patterns that you can't anticipate and you want to allow the judge or whoever is the decision-maker to be able to put those into the system.

**MIZE:** You raised an issue that is of real concern to judges, and that is the idea that the Legislature really wants judges to have discretion. That's not the case in California, where the Legislature is always coming to judges and saying, "This is how we want you to rule when the facts are *A*, *B*, and *C*. And we do not want to give you discretion because of anecdotal evidence of judges' not making a clearly good choice."

So, while I'd love to believe what you just said, in fact I don't think it's true.

**JACKSON:** Well, part of the problem is that the Legislature is often reactive. And when we see a bad situation that comes into play because of some mix-up in the system or inattention—you have a hundred cases, it's the one case you couldn't get to that becomes headlines—that's when the Legislature tends to react and to respond in a way that takes away the discretion.

**MIZE:** From the 99 judges that were doing well all along.

**JACKSON:** Exactly. And part of the problem, too, is that you see fewer and fewer attorneys becoming legislators, particularly those who have practiced law, so we get farther and farther away from the reality of the court system and the entire process.

**MODERATOR:** There are two factual changes I want to add to this hypothetical. The first, Dan, is that your wife, "Jane," is the sister of Diane. And you and Jane have a 6-year-old, little Daniel. And Jane's interested in this situation because she's recognizing, "Here's my niece and nephew." You guys love them. You guys see them on holidays. You're very close to them. And, of course, Jane is a stay-at-home mom with little Daniel, and she thinks it would be great to have the twins there with your son. And she wants to try to persuade you to think about getting involved in this case. But there's also another important factual issue about Chris. I think that you have most of the facts but not all of them. I didn't mention that Chris is "Christine." And Christine is very interested in this proceeding, and we're going to get to a battle over who should have custody—Christine, a person who really loves and has raised these children, or the relative, Jane.

Jane comes to you and says, "Dan, dear, you know that Ashley and Ben need to be with their real family, not with this person who has no biological connection to them at all. We're not rich, especially since you took that doggone federal job. But we've got a nice home and we can take them in. We should seek

to become responsible for Ashley and Ben. I just want you to support me, Dan.” Done?

**LUNGREN:** I would try. We grew up with the idea that you help one another. If you come to me and you tell me that you want us to see if we can do it, I’m game if we really do believe it’s best for the kids. If so, we’ll work as hard as we can to make sure it happens.

**MODERATOR:** But the question is, do you believe it’s best for the kids?

**LUNGREN:** What I know about these children, yes. I mean, I’m happy to have them come live with our son.

**MODERATOR:** Do you at all think about taking these children away from their mother?

**LUNGREN:** No, I know my sister-in-law has a drug problem, I know it’s serious, I’d like to see her get help. But I also know the difficulty, and a lot of things are stacked against her. And so I’m thinking about three people right now. I’m thinking about my sister-in-law, who has things stacked against her, and I’m thinking about the two kids. If I can save the two kids, and I can’t save my sister-in-law, I’ll do everything I can to save those two kids.

**MODERATOR:** Well, you might save them by letting them go with Christine, who they call “Mom,” who they’ve lived with for four years, who’s been their mom, who has a real bond with them. Why would you be against that? Why wouldn’t you tell Jane, “No—I understand, honey, it’s a good idea, but they’ve got a mother who has a good job, who can afford to take care of them. Why should we not let them go?”

**LUNGREN:** Well, I think we’ve got a stable relationship, we have a child here, we have an established family. It seems to me it’s a better environment for those two kids.

**MODERATOR:** Why is it a better environment? Gary Seiser, what do you think about Dan’s analysis here?

**SEISER:** I think it’s perfect. He’s trying to support his wife. But we haven’t said what is best for the children. And the number-one question that I’m going to ask is, “Brittany, when you talk to these kids, where do they want to be, and who do they see as their most

important family members?” I’m glad we’re in the dependency system because now we’ve got a forum to litigate whether Chris has any rights or should get placement or the relatives and how we’re going to do that. But I’m going to ask, number one, what is that relationship and what does it mean to the children? And that’s going to be very important.

**MODERATOR:** Falope, let me ask you. Would you respond differently than the way that Dan Lungren responded? What do you see as the issues from your point of view? No red tape, we got bedrooms, all that stuff, we’re set. She has the equal opportunity to provide for these two twins.

**FATUNMISE:** Then I think Christine is the ideal placement for those children.

**MODERATOR:** Make Dan understand that. It might help him persuade his wife to go in the other direction. Talk to him.

**FATUNMISE:** These kids have established a bond and a relationship with Chris, who they see as their mother. And I don’t see anything that could be closer or more endearing or loving or caring for these kids than to be with their mother. It doesn’t mean that your sister couldn’t have visitation with these children. But to take these kids away from their mother is just a further disruption of these kids’ lives.

**LUNGREN:** Look, I still think, and this may be the minority view on this panel, but I still think the best environment for a child is to have a mother and a father, if they can be raised in that setting. There are other situations that work. But I still believe that.

**MATTHEWS:** But, Dan, that’s not the choice with these children. The choice for Ben and Ashley is between staying with their mother after their other mother had to go into rehab and going to live with their uncle and aunt, who maybe they have visited, but they don’t have that primary parent-child bond.

**LUNGREN:** Well, where has this mother been for months? Because my sister-in-law took off with the kids. So there obviously was not a stable relationship between those two. She took the kids away, essen-



tially stayed away from this other mom. And so I'm wondering how stable is that relationship?

**GRAY:** But the sister-in-law was using drugs, so any decision that she made obviously might not have been a stable one. She was impaired by her drug usage. So, yes, she ran off and took the children with her, but that doesn't mean that she did it for lofty purposes.

**MIZE:** Diane may not have been stable, but Chris may be very stable.

**GRAY:** Right.

**MODERATOR:** Well, let's just resolve it. Judge Bresee, they're going to be in your courtroom. And Martha Matthews, you represent Christine, who is Diane's partner. Janet Sherwood, you represent Jane, who is Diane's sister. Each of you has to persuade this judge that your situation is the ideal one. Janet, why don't you go first?

**SHERWOOD:** I move for de facto parent status, Your Honor. Under the Constitution of the United States of America, my clients have a due process interest in participating in this proceeding because, as potential caretakers and relatives of these kids, they have at least a notice and hearing right to participate in the ultimate decision. But we shouldn't proceed until counsel has been appointed for these children.

**BRESEE:** I agree.

**MODERATOR:** Counsel has been appointed. Don't worry about that. So, Martha, what's your argument?

**MATTHEWS:** Your Honor, under the case of *Karen C.*,<sup>2</sup> my client is a presumed parent for the same reason that Nicholas H. was a presumed parent. My client held out the children as her own for four years. The children call her "Mommy." The children are intensely bonded with her. There's been a stable parent-child relationship. This dependency petition should be dismissed. There's no reason for a dependency here, and they should just go home and live with their mother and, hopefully, their other mother will get out of rehab.

**MODERATOR:** Talk to Gary, Brittany, about what you want to interject in this case, your thoughts, because

he's going to have to argue to the court next, persuade the court which decision to make. Tell your supervisor what you think should happen.

**PETTIGREW:** Well, after interviewing the children, it appears to me there's evidence that their primary connection is with their mother and their mother. So my preference would be placement with Christine as a nonrelative, extended family member, who is also an approved home. The dilemma I see is that I'm not sure if I'm allowed to give preferential treatment to this nonrelative, extended family member—someone who's defined as an approved relative—when all other things are considered equal. But I can tell you that my recommendation to the court would be that the children go with Chris because that's where their primary connection is and I hope that the court agrees, and that you litigate your little heart out to make it happen.

**MODERATOR:** Gary, you get a chance to appear before Judge Bresee. What are you going to say to her?

**SEISER:** Your Honor, we're here today to deal with where these children should be placed and whether they ought to be in the dependency system. But before we can do that, we need to determine who are the parents so that we can determine what rights they have in this litigation. And, as an officer of the court, I'm suggesting that we should first deal with the issue of whether Christine is a presumed mother. If so, she is going to have a right to appear as a parent and to litigate the issue of placement as well as jurisdiction. So I think that's an issue we have to deal with before we even get to the issues of placement and jurisdiction.

**BRESEE:** I quite agree with counsel.

**MODERATOR:** Well, we've got one more intervenor here. Hannah-Beth Jackson, you represent the children. And what would you be saying to them?

**JACKSON:** I would be saying to them that we were going to try to figure out a way to get them back to their home to live with their parents, with their mother Chris until their other mother is well and can come home to be with them. They have a good

relationship with their mom Chris and I'm going to make sure that the judge knows that they have that relationship, perhaps with an in camera meeting with the court if the judge felt that was appropriate, depending on how articulate they are in expressing their love and affection for Chris.

**MODERATOR:** Ian Russ, how would you advise Hannah-Beth Jackson to talk to Ashley and Ben? Is that a difficult conversation?

**Russ:** It is a difficult conversation. But rather than asking them their preferences, I'd prefer that you talk to them about the narrative of their lives. Because I don't want them in the position of feeling they're making the decision. So I want to know how they experienced their lives, what kind of things they did with Chris, what kind of things they did with Diane, how well they know Uncle Dan, to see where their life really is based and where their affections are, not by their conscious choice, but by their narrative of the story.

**JACKSON:** Well, I jumped to the conclusion that they wanted to be with Chris, but I agree with you completely. But rather than be as focused on Uncle Dan, the question I keep coming back to is, if Chris were Chris and not Christine, would there even be this question? And I think the law today is clearly moving in the direction, particularly with AB 205,<sup>3</sup> that there will be equal parenting, whether it's a male or female, same-sex relationship or not—the question will be, were they the intended parents? Is there that relationship, parental relationship? Does it make a difference if it's Chris or Christine? I think the law in California is going to the point where the answer is no.

**MODERATOR:** Ian, you get a chance to argue to Judge Bresee. What's your argument to her? What should she do? Where should these children be placed based on what you know?

**Russ:** Your Honor, these children are already in a situation where the world has become chaotic. To stabilize these children's lives, to minimize the trauma, it is essential to their stability that they remain with Chris, who they know as their mother. This will stabilize

their lives during a tough time. Bringing them into the system to move them to an uncle who's peripheral to their lives or to put them into foster care—

**MODERATOR:** Well, peripheral—come on now, it's not peripheral. This is Dan, right? He loves these children, and his wife loves them. You take exception to that, right?

**LUNGREN:** I took them to the World Series to see the Boston Red Sox win—they love me.

**MODERATOR:** But this is a slam-dunk. Everybody's saying Chris, not Jane and Dan, a wonderful biologically connected set of stable family members who want to care for and love their niece and nephew.

**BRESEE:** I think any judicial officer making this decision wants to base it on case precedent and statutes that exist. And this is an evolving kind of process. I think Ian and Hannah-Beth have stated the strong position that I articulated earlier—that the children have made the decision for me. And I always trust the recommendation of the attorney, especially of the attorney whom I know well and trust has indeed spent time with the children.

**MODERATOR:** But Jan Sherwood has described a wonderful, stable, resourceful, loving family with a biological connection to these children. Janet, try to tell her why she should be cautious about what seems like a slam-dunk. Argue for Dan and Jane.

**SHERWOOD:** Well, I think that you need to consider the relationship that these children may or may not have with Christine. Because I think there were some issues about this relationship that need to be explored. But I think you also need to consider this family that can provide them with a stable home on a long-term basis if that's what ultimately becomes necessary. And in the beginning of this case we don't actually know if Diane is going to make it through rehab. We don't know if Christine is actually going to be able to take care of these kids without assistance. We do know that Dan and Jane and Daniel junior can provide these kids with a stable home, and that these children can be there long term if that's ultimately what becomes necessary.

**BRESEE:** I certainly would listen very carefully to that and agree. These are children that were, first of all, ripped away from Chris by Diane. Now they may be facing another traumatic tearing away from someone. I think they're very fortunate to have other loving family members, and, if possible, it makes sense to try to maintain and enhance that relationship.

**MODERATOR:** It's interesting you have this loving relationship, but Christine, who has all the support and love, she's going to be working. There'll be a nanny there. Dan's wife, Jane, will actually be home with the two children and their own child.

**SEISER:** Oh, Your Honor—value judgment!

**MODERATOR:** Values don't matter?

**SEISER:** Values do matter. But we need not to impose our own values. We need to impose the system's values.

**MODERATOR:** Oh my God, didn't we just reject the system's values?

**SEISER:** No, no—we're working in the system. And the system's values say we have to make this decision as thorough and as promoting of long-term stability as we can. So the county is going to ask, Your Honor, not only that Christine is a presumed mother, but we're also going to ask that you make an alternative finding. That even if she wasn't a presumed parent, that you would find that, as a nonrelative, extended family member, this is a better placement for the children because of their relationship than the relative placement with Dan and his family. So should the Supreme Court say, "Hey, next year, we're not going to recognize the Uniform Parentage Act as gender-neutral," and they throw that stuff out and Christine isn't a presumed mother, those kids are still there in a nonrelative, extended-family-member placement.

**JACKSON:** Except, Your Honor, relatives are entitled to preferential consideration and Dan's an uncle, so he's one of the relatives and is entitled to preferential consideration. And relatives, I believe, are one step above nonrelative, extended family members in terms of preferential consideration.

**BRESEE:** Consideration, not presumption.

**JACKSON:** I agree, Your Honor, consideration. But I think there's another issue here. I think Welfare and Institutions Code section 316.2 requires Christine to file a UPA action. And until she steps forward and files a UPA action and gets herself declared a presumed parent this is all just hypothetical, because she actually doesn't have any standing until she asserts her parental rights, if any, and she hasn't done that yet. All this discussion about Christine is premature.

**MODERATOR:** But your thinking is that the challenge is between the best interest of the children, as we hear Martha on behalf of Chris arguing, and what some may say, that society has a different interest, a biological interest. And is that a dilemma for judges, or is it clear enough that you're going to figure out the best interest of the children and not let society impact how you have to rule in this case? Because they could be in conflict.

**MATTHEWS:** Parenthood trumps everything else. If you're a parent, you're on a whole different level from even the most loving and wonderful uncle or family friend. If you're a parent—and that's why I think the UPA is very important here—and you haven't been found unfit, our court really should not be in the business of saying, "Gee, is your uncle a lot better than your mother?" I mean, how many of us who are single parents would really want to have that go to court?

**PETTIGREW:** As a social worker, I'm definitely going to recommend for the children to get placed with Chris, or for Chris to become a presumed parent and have that standing. But the reality is that I'm not expecting that to actually happen. In my experience, those kinds of decisions have been really inconsistent and based on various nuances of a particular case. So I'm not expecting anything. For me, I'm basically having to finesse both sides of the fence because regardless of where all the fallout lands after the decision is made, I have to work with whoever wins.

**MODERATOR:** Well, you prevail. It seems the majorities prevail. You and Gary and Martha and Ian—

sorry, Janet—all succeeded in getting this placement with Christine.

**BRESEE:** First the court would declare Christine to be a presumed parent. There's a legal status to her.

**MODERATOR:** Professor Matthews, of course there's another little wrinkle. Christine has been working with Diane and trying to make this relationship work, but it hasn't worked. So Christine throws up her hands and says, "Y'know—I'm outta here."

And so Diane says, "Oh no, you're not. I'm filing a petition for child support for you to support these children."

Professor Matthews, not Attorney Matthews, tell me, does Diane have a case?

**MATTHEWS:** Oh yeah. If you're a presumed parent under the UPA, I think the parenthood should not be unbundled. If you're a parent for one purpose, you should be a parent for all purposes.

**MODERATOR:** Never filed to become domestic partners, never filed to become formal parents.

**MATTHEWS:** She's still a parent under *Nicholas H.*<sup>4</sup> and also *Karen C.*<sup>5</sup> If someone has been holding out for years and years to the child, and to the community, and usually to the other parent, "Hey, I'm a parent," and later it turns out that they don't have a biological connection, or even knew from the beginning they don't have a biological parent, tough luck, they're a parent.

**MODERATOR:** Dan, isn't this what you're worried about? Here we go. Now Christine is going to be held responsible for paying child support and you wanted to take over, you have a biological connection—

**LUNGREN:** I'm going to say let her pay. Let her pay.

**MODERATOR:** This is what they asked for, right?

**LUNGREN:** That's right.

**MODERATOR:** Mike McCormick, what do you think about this? What's going on here, Michael? Should Christine be forced to pay child support?

**MCCORMICK:** I think that she is in a position where she is going to end up paying child support.

**MODERATOR:** But you haven't told me how you feel.

**MCCORMICK:** Do I feel that she should necessarily be paying child support? No, I'd be more inclined to think the children ought to be with her and she ought to be supporting them, not necessarily writing a check that's going to flow to a different direction.

**SEISER:** But part of the answer is going to depend on what county are you in.

**MCCORMICK:** Oh, absolutely.

**SEISER:** And another part is going to depend on what does the Supreme Court do next year with the *Kristine H.*<sup>6</sup> and *Elisa B.*<sup>7</sup> cases.

**MCCORMICK:** Unquestionably, and I think that that's where the placement becomes so important here, because if you have an application to the foster system for benefits, the system is going to look back to a parent to collect child support from. We need to see if we can have those children with that parent regardless of whether it's Christine or whoever may be presumed to be the parent, where there is no triggering of all those mechanisms with regard to payment and support.

**JACKSON:** I think as the law moves in the direction of intent of the parent or intent to be a parent, you have to take the responsibilities along with the rights. And I think in this situation, if Chris is the presumed parent, whether male or female, I think that there is a responsibility associated with that. If there's a relationship based upon an intention to have that relationship, there are responsibilities. Chris wanted all the rights to go with being a parent, and I'm hoping that we get more consistent so that we're not constantly finding different jurisdictions operating differently.

**SEISER:** Although the majority here on this panel would say she should be granted presumed-mother status, the law is not settled on that.

**MODERATOR:** There's another dilemma right down the hallway from this courtroom. In the courtroom right down the hall, there's a proceeding that's about to start with the appellate court. And the appellate court consists of Justices Lungren, Bresee, Mize, and Matthews, along with Chief Justice Gray.



Elaine and Francine were a lesbian couple, and Elaine actually donated her eggs to Francine seven years ago so that they could have a child. And they have these, again, twins. And these two 6-year-olds are part of this wonderful relationship. But they break up after six years. Francine gave birth to the children, but Elaine now wants to be declared a parent. She signed a consent form when she gave these eggs, acknowledging that she was waiving those rights. But now she says, “You know—my eggs, my children, six years—I want to be a parent.”

Elaine, who donated the eggs, lost at the trial level. But now we have the court sitting en banc and I’d like to hear Chief Justice Gray. Let’s figure out what do we do about Elaine’s petition that says, “I want to be declared a parent.” Do you speak first, or do you want to push one of your other colleagues?

**GRAY:** Being the chief, I want to hear from Justice Matthews.

**MATTHEWS:** Well, they’re both parents. I mean, if they have been raising these children together as parents for six years, the mother who gave birth to the children is a parent by virtue of the UPA. The mother who donated the eggs may not be a parent by virtue of the egg donation because of the waiver. However, if they intended to parent the children together, and they actually did so for six years, then regardless of what she signed in the hospital, she’s a parent. So they’re both parents. Case closed.

**MIZE:** I agree with that, I just have some concern about what her intention was when she waived the rights. Why did she waive them?

**MATTHEWS:** Well, there are these standard forms that people sign when you’re an egg donor; when you’re giving your eggs away to strangers, you always have to sign a form. What probably happened, and of course we defer to counsel on the record, is that people get a stack of forms to sign in the hospital. And they sign them without paying that much attention. And they think, “This doesn’t matter because, of course, I’m not giving my eggs to strangers. I’m giving my eggs to the children’s other mother, and we intend to raise them together. So I’m just signing

this silly form because I’m signing a bunch of forms without paying attention.”

**MODERATOR:** She signed the form.

**LUNGREN:** But if in fact the record shows that for whatever reason she intended to sign the form because she did not want to take on the responsibility of being a parent, then I think we’ve got a whole different thing that we’ve got to worry about.

**GRAY:** She signed the form, and it’s too late to change her mind.

**MODERATOR:** All you need, Dan, are two votes.

**LUNGREN:** I understand. But you will find this hard to believe. I’m concerned about the interest of the children in this case. The forms have to mean something. She signed the form. Presumably she had knowledge at the time she did it. We have these forms so that they will in fact determine what a decision will be some years later. We can’t just reject these forms out of hand. She put pen to paper. For whatever reason, she did not want to be the parent. Case closed.

**MATTHEWS:** I actually agree with Justice Lungren that that is important. I mean, you could have a situation where someone intentionally sets it up so that the mother who gives birth is the only legal mother, and says, “Hey, I’ll participate in this project of yours. You want to have kids, I’m your girlfriend—fine, here are some eggs. But you’re really the only parent.” I mean, it’s important to know what they’ve been doing for six years. If they’ve been raising the children together, and the children call them “Mama” and “Mommy,” then I think they really are both parents. If they’re saying, “That’s your mom, I’m just this friend over here, and, gee, I happen to look like you,” then you’re right.

**MIZE:** How would this be any different if in fact they started their relationship after she was already pregnant and then just lived six years together? Clearly there would have been no intention to have donated the egg. But there would have been the six years. So I think the six years becomes determinative.



**GRAY:** I guess I'm looking for help. Because, for me, I sort of agree with Dan on the signing of the form. And I would be concerned if we start saying people can sign the forms but they don't mean anything—that we're maybe undoing a lot of relationships that were based on signing that form. So I'm having a real problem, being a strict constructionist person that I am. But I'm sort of in the middle and I could, at this point, go either way. I'm also convinced by the fact that they held themselves out as parents for six years. And, to me, looking at the best interest of the children, who didn't know anything about the forms, that's not the issue for them. So how do we decide?

**BRESEE:** I would defer to Justice Mize and his comments. I think we have to look at the relationship that's gone on for six years. How did that intent manifest itself?

**MODERATOR:** Interesting— You have a choice of the genetic connection as one way to go. You have the six-year relationship as another way to go. And you have the signing of the form. Those are all interesting, different facts in this case.

**MIZE:** Let me see if I can clarify, also, to Chief Justice Gray. If it were three weeks or three months after the signing of this form, my opinion would, perhaps, be very different. So the six years makes a difference. I'm just saying that your concern is appropriate. We have to give some power to a signed document. We act as if people know what they're doing and give the opportunity for people to donate eggs and sperm without the necessity of having to worry about people coming back and getting child support from them. But this is six years later, and I think that makes it easy.

**LUNGREN:** But what if we had evidence that in the fourth year she still maintained that position, "I didn't want to do that." But then in the last two years has had a change of mind.

**MIZE:** It's a closer case then.

**GRAY:** So what's our decision?

**MATTHEWS:** Were they holding out as parents? I think that's part of the record.

**GRAY:** That's part of the record. Six years they held themselves out as parents. They made all the decisions about daycare, they made all the decisions about Little League baseball and all those kinds of things. They shared expenses. And so the record supports that they were both holding themselves out as parents. For six years they did that. And so I'm saying they're both parents.

**MODERATOR:** So is this unanimous? Is there a concurring opinion? Unanimous decision, okay.

**MODERATOR:** Well, we've got another interesting question I'd like Michael McCormick and Gary Seiser and Martha Matthews and Janet Sherwood to weigh in on. What happens when we have an egg donor or a sperm donor or both and a child is born? That child becomes, because of the separation of the parents, a ward of the state. Gary, should we be able to go after the egg donor or the sperm donor for support of this child in your view?

**SEISER:** Well, first off, in the dependency court, we're not going after them for support so I actually have no idea. That's a completely different area.

**MODERATOR:** Is there an agency that deals with it?

**SEISER:** Sure, sure—child support.

**MODERATOR:** And what do you think would come from child support? What would they say?

**SEISER:** Where can we get the money? They are far more concerned with—they're not really dealing with child custody, child placement, child welfare. They're dealing with fiscal responsibility. And they're most focused on, in my perception anyway, where can we get the money?

**MODERATOR:** Marjorie Kelly, what do you think of that? What do you do here? Go out to the egg donor, go out to the sperm donor—what do you think, having been involved in the system at some level?

**KELLY:** I'm stumped, frankly, because I think when we have egg donor situations and sperm donor situations, clear legal steps are taken to protect those folks from exactly this situation. And so I think that what you've got to overcome is not just the question of should we go after them. What you've got to

overcome is the central legal question of could you, if you wanted to, could you? And then, secondarily, should you?

**MODERATOR:** It's interesting because we're saying, "You have no rights, you're signing those waiver forms, you have no rights, but do you have any responsibilities?" Janet?

**SHERWOOD:** Part of the reason for the waiver forms is also to protect the sperm donor and egg donor from ever getting hit up for child support because they wouldn't donate if 10 years from now, surprise, you know, you're a mom.

**MODERATOR:** Does the form actually say that?

**SHERWOOD:** I think it's statutory. It's the rights/responsibilities thing. You're giving up your rights, so you're also being relieved of the responsibilities of a parent; and since you have neither, you have no legal responsibility for that child.

**MODERATOR:** And that makes sense to you, Michael McCormick?

**McCORMICK:** It's somewhat analogous to the determination of parental rights. If your parental rights are terminated, you don't continue to be financially responsible for the child. It's similar when you have a donor situation. They didn't donate with the intent that there would be a financial obligation down the road. They also didn't donate with the idea that they would be a part of the upbringing of the offspring of that particular union. So there shouldn't be the ability to go back after child support.

**MODERATOR:** We have one more interesting development in this hypothetical. Guess what? We have found Mr. One-Night-Stand. His name is Michael Smith. Very successful guy, has a wife, has a great family. Michael Smith actually had no idea back then that Diane became pregnant. It was a one-night stand, and they did not see each other for a long time. But then he happened to be at the home of a mutual friend of his and Diane's and saw this picture of these wonderful twins. And they looked just like Michael. And Michael's saying, "Those are my kids." And he has a genuine interest in finding out that

he's been a father and to take responsibility for those twins. For the sake of this part of the hypothetical, Michael McCormick, I want you to play Michael Smith. Congratulations.

**McCORMICK:** Thank you.

**MODERATOR:** And your wife is interested in this as well. You have an interest in getting involved. I want you to talk to Ian Russ because Ian knows a lot about children and family and relationships and you really want to get involved and become the father of children for which you were responsible. Can you talk to Ian? Can you guys have a conversation? Ian, can you help him? What should he expect? What is he going to go through? What should he do and not do? Can you talk to Michael?

**Russ:** Well, I think that you need to talk to the mother. And to talk about whether or not they think there is a space for you somewhere in this relationship, that they would be willing to bring you in. Yet they are the parents that these children know. And to enter into a custody fight would be awful for these kids. But talk to the parents and to see if there is a place for Uncle Michael, maybe, in these kids' lives.

**McCORMICK:** What if they say no? If they just turn me down flat?

**Russ:** I think you need to think carefully about what the impact is going to be on these children's lives. And to understand that has to be the organizing factor and not your own wishes and feelings.

**McCORMICK:** And I could certainly deal with that and would want what's best for my children. You know, I have friends who have adopted children, and those children have gone back to find their birth parents. Children want to know where they came from. And so how do I help them know where they came from, not wanting to disrupt their lives, but wanting to give them the benefit of what we have in our life and to give them the benefit of their heritage. How do I do that?

**Russ:** Well, I think that you have to understand that you're talking about your wishes here, and they have value, but the children are living in a family that has

set up its own value systems and its attachments. And I would be very wary of interfering in that family's life if they don't want you in it.

**MCCORMICK:** I appreciate that. If the children do want me in their lives and the parents do not, how do we handle that particular situation? Because I recognize that I want to be in their lives. Their mothers may not want me to be in their lives. But the children may have a desire different from what the mothers' are. How should I deal with that particular situation?

**Russ:** Well, I don't know how we would find that out without talking to the children about your existence, which would kind of already bypass the mothers' authority. Yes, at an older age they might wonder, "Hey Mommy, where's my daddy?" And I would hope that there are ways to go and investigate this.

**MODERATOR:** Michael, let me give a little advice. Don't talk to these child counselors. Get yourself a lawyer. Janet, you are Michael's lawyer. Talk to your client. He's excited. He's found two children that he's responsible for. Talk to him because you're going to court soon.

**SHERWOOD:** Well, Michael, you've got a couple of options. I'm not sure we've really clarified whether these kids have two mothers psychologically or these kids have two mothers legally.

**MODERATOR:** Yes, psychologically.

**SHERWOOD:** One of the first things you want to do if you want to establish a relationship with these children is file a UPA action to establish a parent-child relationship legally between yourself and these children. But you need to understand that if you do that, you're making yourself financially responsible for these children as well as giving yourself certain rights to custody and visitation and so forth. Second, you need to understand that if you file this UPA action, you're probably not going to end up with custody. The most you're probably going to end up with, at least initially, is visitation. And that may be very limited, and it may even be supervised by a therapist or somebody at least in the beginning, until the kids get

to know you a little bit and are a little more comfortable with you. Third, you need to understand that this is going to be a very tough fight and you may lose altogether, and, therefore, I want my money up front. Because our Supreme Court, in a case called *In re Zacharia D.*,<sup>8</sup> said if you have unprotected sex, you are on notice that there may be a child as a result and the "I didn't know" excuse does not cut it. And so, if you delay in making an effort to find out whether a child resulted from that relationship and in attempting to establish your parental rights, that delay can be used against you. And it may be used against you in this case, and you may not be successful in getting a court to recognize a parent-child relationship between you and these kids. So, given all of that, what do you want to do?

**MODERATOR:** No, no, no. She's got your money, she wants money up front. I want something more positive than that. Aren't you going to win this case, Janet?

**SHERWOOD:** No.

**MODERATOR:** Why not? You've got the biological father here. You've got him.

**SHERWOOD:** I've just told him the reasons why I don't think we're necessarily going to win.

**MCCORMICK:** Well, I want to ask you a question. I do have the resources to enter into this particular situation. But I'm also very pragmatic, and I want you to tell me, lay it out for me, what is the most likely scenario given this set of facts and circumstances?

**SHERWOOD:** Well, first of all, we're going to carefully choose the jurisdiction in which we file. And we're going to look at our family law bench, and we're going to hope we can file this in a jurisdiction where they're kind of conservative and where they're more sort of family-values oriented. Because that's going to increase your chances, I think, of convincing the court that your mere biological relationship is sufficient to establish—

**MODERATOR:** Mere biological? You're his lawyer. My goodness. How much are you charging this guy?

**SHERWOOD:** I have to tell him the truth. The answer is I cannot guarantee it. But in certain jurisdictions your odds are much better than in others.

**MODERATOR:** You've got the gist of it now, Michael. Judge Bresee, this case is now back on your calendar. And, of course, Martha Matthews, you represent Christine. So, Judge, who do you want to hear from? Here comes Michael Smith. Raring, able, loving, wants to be the parent.

**BRESEE:** I think Jim thinks this is pretty simple.

**MODERATOR:** All right, Jim, it's simple. You decide it. Do you want to hear from the lawyers, or you don't need to hear anything from the lawyers?

**MIZE:** I don't need to hear from the lawyers. This comes up all the time. Particularly, fathers come into play sometimes 6 months later, 6 years later, 12 years later. We see that all the time. Not this particular fact pattern, but others like this. And my philosophy always has been—I don't care how long it's been, if they're finally coming to the table to accept the responsibilities, then I'm going to let that happen. But Jan's advice was correct. There's a distinction between having the father come in and now being a father, paying the support, getting visitation versus custody. The likelihood of his getting custody or full custody or something is really very, very small.

**MODERATOR:** Why?

**MIZE:** Because he hasn't been a part of the child's life during all the bonding periods.

**MODERATOR:** Well, not immediately. But you're not ruling out the possibility that he will now share—you can't say that he will never get full custody?

**MIZE:** I won't say that at all, ever. But I will say that at the very beginning it's going to be possibly supervised, have a professional bring them together and then have some time to spend with them on a week-day basis. Then maybe extend to the weekend.

**MODERATOR:** Maybe we need to hear from Brittany and Gary Seiser because, Brittany, you know these two children and here comes the father, four years later. What do you think about this? Talk to Judge Mize. You've always been concerned about

Ashley and Ben. Father wants to come back in the picture. He's got resources. He loves the children. He wants to take full responsibility. What do you say to the judge? He wants to get in their lives. Walk us through it. Do you have any reaction to his enthusiastic interest?

**PETTIGREW:** Well, my reaction is obviously curiosity. I just want to know more about who you are and what you can offer the children. I don't know that you present an immediate detriment to the children. So I start with what is the most successful way that I can incorporate you into the children's lives. It's going to be disruptive no matter what happens, bringing a new person into something that's been cruising along. But what's the best chance of success for you to be introduced to these children and to have a relationship that honors where they've been but also gives an opportunity for the future?

**MODERATOR:** Falope, did we see this coming? He comes back. What would be your input at this point? Is this a good thing for these children? Or is it a bad thing?

**FATUNMISE:** Well, I think it's a great thing for these kids. I always believe the largest support system that a child can have the better off the child is. I do feel that the most challenging aspect would be the relationship between him and the children versus him and those adults. So at some point I would offer some level of family conferencing so that they could actually get together and talk about how they're going to be intervening with these children. The truth is that those children really would want him in their lives because there is a relationship between a biological parent and a child that's never separated. So they will always want that relationship with that biological father.

**MODERATOR:** Judge Seiser?

**SEISER:** What we're creating here is the possibility of three parents that the court will recognize, if they recognize Mr. Casual Inseminator as a parent. We have a mother and another woman—we should not call them both "mothers"; we should say "mother" and "a second parent." Because the case law suggests



that we ought to use that terminology. If we've already done that and have two parents, this is going to be three.

**MODERATOR:** Right now we're really talking about Christine and we're talking about Michael.

**SEISER:** But we know there's another one out there. And the concern I have is that we're setting a precedent. And I realize it's not a published case, but if in our courthouse we have walked in and said, "There can be three parents," we are in deep doo-doo on the next case where we try to say, "No, only two."

**MODERATOR:** Dan, it sounds interesting, doesn't it?

**LUNGREN:** That's why they should have let the kids go with me, Uncle Dan. We could have solved this, we'd have stable relationships, they could go fight with themselves. They could come see the kids when they wanted to.

**MATTHEWS:** I think that as the children get older they will have questions about their biological origins. But these kids already have two parents. And I've already filed my UPA petition and it's been granted. And there's also case law saying that when there are two competing presumptions, when one person shows up and says, "I've been holding out for four years," and another person shows up and says, "Oh yeah? But I was the one who got her pregnant," the presumption supported by the most compelling reasons of policy wins.

**BRESEE:** And he isn't even a presumed father.

**MATTHEWS:** This guy—well, maybe at the discretion of the parents. There are two fit parents. They get to decide what other relationships their children have. And so, as the children grow up, they get to decide when it is appropriate and how it is appropriate for them to meet their biological father.

**MODERATOR:** So what do you say to Michael? Is there no future for Michael in terms of ever becoming a parent to the two children that he has a biological connection to? I'm not asking you as Christine's counsel. I'm asking you as a citizen, as a person. Forget about the advocacy. Talk to Michael. Tell him.

**MATTHEWS:** As a person, I really struggle with this because I actually think that the law may be moving in the long term toward the recognition that there are real children who really do have more than two parents. And it will be as you said, deep doo-doo. It'll be hard for our family court system to accommodate that. But there are stepparents. There are already children in my child's elementary school who have more than two parents. It's just the law doesn't call them that. And so I hope that we evolve to a family court system where somehow we can fairly adjudicate, "Hey, this kid has two mothers." Maybe we need tiers of parenthood.

**MODERATOR:** The question is, is there something wrong with three parents?

**MATTHEWS:** No, but it's scary to think about in terms of how do you run your court system.

**MODERATOR:** Falope, here are three people who love this child. And we're trying to define it so that there are only two people.

**FATUNMISE:** And my concern is that's all a legal aspect. What we are concerned about is "the system." We aren't concerned, it appears, enough about what's best for those children.

**MODERATOR:** Do you agree with that, Marjorie?

**KELLY:** What I actually think is that by the time this goes through all these assorted systems, with all the assorted value systems and decisions, the kids will become teenagers and they will choose where they want to live and it will just happen. And the judge won't get to say, and I won't get to say.

**MODERATOR:** And then Dan will get them, right? Brittany?

**PETTIGREW:** In my view, it's our challenge to become more inclusive, because we know that children aren't really independent at 18 even though society calls them adults. So, to me, the challenge has to be how we include him without disrupting.

**MODERATOR:** Let me just ask you, Hannah-Beth Jackson, is a new law going to create this three-parent possibility?



**JACKSON:** I think we're going to have to—I won't say close the door on it, but make some kinds of policy decisions that say, "If you get in the system, we are going to limit the extent to which we can make those decisions." I just think from the practical aspect there comes a point where we're going to have to put in some kind of guidelines so we don't end up having the biological father come in and then maybe Dan coming in—you know, we're going to have six different people with six different lawyers, six different sets of representatives for the children, and then six different members of the social-work community or DPS or the dependency courts, the juvenile courts—then we don't have enough judges to hear them all. That's the problem. So let's not make it worse.

**SEISER:** Our courts are doing us a great disservice when they create these multiple kinds of parents or start recognizing more than two parents without waiting for the Legislature to give us the tools and the guidelines to say how the people in the trenches every day should handle it.

**MIZE:** The courts aren't in position to be able to make policy. They're just deciding the cases.

**SEISER:** No, no, no, you're talking the trial court. Our appellate courts and our California Supreme Court are making policy. And that's problematic. It needs to be dealt with in the Legislature, not in the courts.

**MODERATOR:** Judge Gray, this case comes to you. Here is a new and final twist on this amazing story. We're in the State of South Idelia where you are presiding judge. Both Christine and Diane come back together. And Diane is taking care of her drug problem. They seem to be very steady. Things are going well. Christine has a very good job. And all seems to be going well with the children and with the parents. And then tragedy strikes. While they're in South Idelia, living there, Diane dies in a traffic accident.

Michael, you live in South Idelia. You're a native of South Idelia. And so now you're in a state that also doesn't recognize same-sex marriages. You're home. And you've still got Janet Sherwood representing

you. And Martha Matthews, you still represent Christine. And now Michael says, "Look. Now it's clear. These are my children, and I'm going for the full enchilada. I want full custody."

So, Martha, you're down in South Idelia practicing family law. Argue in front of Judge Gray whether or not Christine should retain custody now that Diane is gone. What's your argument to Judge Gray?

**MATTHEWS:** What has Michael been doing all this time?

**MODERATOR:** Still trying to get closer to his children. He has been in their lives visiting.

**MATTHEWS:** Well, I'm not sure what I have to work with in terms of case law.

**MODERATOR:** She was a parent in California. Here we are.

**MATTHEWS:** Under the interstate compact, under full faith and credit, this person has a UPA declaration of parentage from California so she is a parent. Then there is this other biological parent who has not had much relationship with the child. I guess I'd be asking for a custody order to Christine with visitation—I mean, if there is any dispute between Christine and Michael, I would try to get a custody and visitation order nailed down with Christine having primary custody and Michael having visitation.

**MODERATOR:** Janet, what would you argue for Michael?

**SHERWOOD:** Well, Your Honor, this state does not recognize same-sex marriages. So whatever that order from California is, it's not recognized in this state. She may have been a legal parent in California, but she's certainly not a legal parent here. Michael clearly is the legal father of these children. And he's been trying for years to become the legal father of these children and to get custody and visitation. And Christine has totally cut him out and has refused to let him have any contact with his very own children. And now that Diane is gone, who was the other legal parent, this complete stranger should not be allowed to continue to cut Michael out of these children's lives. I'm asking the court to declare Michael the legal parent of these children and make a custody

order giving him full custody and perhaps giving him discretion as to whether or not Christine should have any visitation, depending on whether it's in the best interest of the children and whether she behaves herself.

**MODERATOR:** You must have paid all your legal bills. This is a much better argument. Boy, she's fired up, Michael.

**GRAY:** The law is clearer.

**MODERATOR:** Okay, Judge Gray, it's clear—this is a simple case.

**GRAY:** Under the law in my state, I'm prohibited from giving any recognition to an out-of-state same-sex marriage. No recognition at all.

**MATTHEWS:** Can I have some rebuttal time? An order was not issued yet. This UPA declaration of parentage was not based on any purported same-sex marriage, which doesn't exist in California either. This was based on a finding under a presumption that is common to the Uniform Parentage Act in 33 states, and I don't know if South Idelia is one of them, that someone who holds his or her child out for more than two years as a parent is a parent. It doesn't matter if she's male or female. That presumption applies and, under full faith and credit, that parentage declaration is just as valid here as it was in the state in which it was issued. We would have chaos if states don't recognize each other's parentage orders. Your Honor, please reconsider your tentative decision.

**GRAY:** I believe that I cannot under the current law. Down the road we may be able to do that, but currently I do not believe that I can. And, therefore, I'm ruling in favor of Michael.

**MODERATOR:** I'm Ben. Explain this—

**GRAY:** And how old are you now?

**MODERATOR:** Eight. You just wanted me in chambers. Ashley's not feeling well. She's devastated to hear that you're going to take us away from our mommy.

**GRAY:** I would not have Ben in chambers at 8 without his lawyer.

**MODERATOR:** All right, the lawyer's there.

**GRAY:** And probably with every other lawyer as well because none of the lawyers trust me to get it right. So I have to have them all in chambers.

**MODERATOR:** It's all on the record—talk to me.

**GRAY:** Ben, I know that you have been living with Christine—

**MODERATOR:** My mom.

**GRAY:** —your mom, for some period of time.

**MODERATOR:** My whole life.

**GRAY:** Your whole life. No, no, actually there was a period of time in your life, Ben, when you were not living with Christine.

**MODERATOR:** With my grandparents very briefly. My granddad had a stroke; my mom came back and she's been there for us.

**GRAY:** And you know, Ben, that all during this time there have been lots of people who wanted to take care of you.

**MODERATOR:** And nobody loved me like my mom and my mom.

**GRAY:** Well, actually Michael loves you. I've had—

**MODERATOR:** He said that, but I don't know him. He just came a couple of years ago.

**GRAY:** Let me show you how I conclude that Michael loves you. Michael, when he didn't have to, came into court and said, "Judge, these are my children. And I want to be in their lives." And even though there were a lot of people saying that that shouldn't happen, Michael consistently, over the course of the last four years, has said to this court, "Judge, these are my children, I love them, I want to be involved in their lives."

**MODERATOR:** I just lost one of my mothers, and now you're going to take me away from the other one?

**GRAY:** No, I'm not going to take you away from Christine. I'm not going to sever your relationship. I'm going to let you stay with Michael—

**MODERATOR:** Ian Russ, what am I hearing as 8-year-old Ben? Tell me what's going on here.

**Russ:** Disaster. When Michael professes his love to these children, it is not the love for these children; it's the love for the fantasy that he has about these children, because he hasn't had a relationship with them. And that is with all the goodwill and desire that he has to want them in his life. There isn't a history. What Ben is hearing is that the world that he knew doubly is lost. That his mother, Diane, is dead and that he is being kidnapped, taken away from his mother. And that this isn't like after a nasty divorce where, two years or so when things are calm, kids can kind of get back on their feet again. This is a huge loss and an unexplainable loss to an 8-year-old. Death is awful, but it's explainable. I know I miss my mom because my mom is dead. I went to the funeral. I cried. But to be taken away from my mom because of some mumbo-jumbo in a court is bizarre.

**MODERATOR:** Well, let me ask the judges very briefly—I hear you talking about the law and what you have to do. But take off the judicial robe just for a minute—does this seem right? Judge Bresee?

**BRESEE:** I don't think the issue of same-sex marriage is what this issue is about. For one thing, they don't even have a same-sex relationship because Diane's dead. It's about parentage, and I buy Martha's arguments in terms of the UPA.

**MODERATOR:** So you'd like to figure out a way to keep these children with Christine?

**BRESEE:** Absolutely.

**MODERATOR:** Judge Mize?

**MIZE:** Might give it a shot if I could. Is the question difficult? Of course it is. We have this stuff 20 times a day in every custody decision. It happens all the time.

**MODERATOR:** Well, we can solve this. Dan Lungren, give us a piece of federal legislation, right? Can't you guys solve this problem? Do we need a federal law to address this issue? Two parents, three parents—what do we need to solve the problem?

**LUNGREN:** I don't think so. This does not implicate same-sex marriage. This goes to the question of parentage. And the states are, as we say, laboratories of democracy, and they're trying to work these things

out. I think it's kind of presumptuous of the Congress to move in on this right now.

**MODERATOR:** Well, finally, the good news this week is that we don't have to worry about any of these problems, Gary Seiser, because on January 1, 2005, California's going to solve the whole thing, right?

**SEISER:** Not at all. California's not solving the whole thing. And that's unfortunate. We had, in 2004, a bill introduced in Sacramento to adopt the Uniform Parentage Act of 2004, an updated, expanded version. That's where we need to put focus. The Supreme Court is obviously going to hand us down a lot of guidance. But history shows us that individual cases create as many problems as they solve because they're dealing with one set of facts. We need the Legislature to deal with the Uniform Parentage Act and say that it's gender-neutral. And say that a woman can create presumptions this way just as a man. We need to deal with it all there in the Legislature so that the courts can ensure that we have guidelines and we operate by them. Our system right now is in chaos. The domestic partners bill<sup>9</sup>—that's a great bill and it's a step forward. But it doesn't solve what we've been talking about for the last two hours.

**MODERATOR:** Brittany, let me ask you finally for some brief comments, just in a sentence: What is a family?

**PETTIGREW:** A family is what the child defines as his or her family.

**MODERATOR:** Dan Lungren, what is a family?

**LUNGREN:** Well, I think there are different kinds of families. I think we have the nuclear family, and then we are moving out from the nuclear family. I hope we don't define family so broadly that we lose any sense of what we initially talked about and from which we move out.

**MODERATOR:** Michael McCormick, what is a family?

**MCCORMICK:** I'll agree with Mr. Lungren. The expansion of the definition of a family has led to a lot of these particular issues. I just think we have to work to maintain some semblance of respect for the relationship aspect of family and the biological aspects of family. As far as the specific definition, it's getting muddier every day.

**MODERATOR:** Falope, what's a family?

**FATUNMISE:** A family is a group of people who are willing to support the best interest of the child.

**MODERATOR:** Judge Gray, what is a family?

**GRAY:** A family, to me, is a group of people, some related by blood, others not, who agree on a set of principles that guide their relationships and they work on what's best for that group.

**MODERATOR:** And Martha Matthews, what is a family?

**MATTHEWS:** What I would call a "nuclear family" is a family of adults who are responsible for a child, who have either brought a child into the world or by their intentional conduct caused a child to be there or adopted a child—responsibility plus relationship. By their conduct they have established that primary bond with the child. That's the family.

**MODERATOR:** I think that as we move into the 21st century, not just in California but around the nation, we're going to have to confront that issue in a democratic, progressive society and answer it for ourselves in a way that would have meaning in the 21st century.

I hope you will join me in thanking this panel for helping us grapple with some very tough issues this morning.

8. *In re Zacharia D.*, 862 P.2d 751 (Cal. 1993).

9. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. {\_\_\_\_}, *available at* [www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0201-0250/ab\\_205\\_bill\\_20030922\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf) (codified at Cal. Fam. Code §§ 297–297.5 (West 2005)).

- NOTES
1. *In re Nicholas H.*, 46 P.3d 932 (Cal. 2002).
  2. *In re Karen C.*, 124 Cal. Rptr. 2d 677 (Cal. Ct. App. 2002).
  3. California Domestic Partner Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. {\_\_\_\_}, *available at* [www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_0201-0250/ab\\_205\\_bill\\_20030922\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf) (codified at Cal. Fam. Code §§ 297–297.5 (West 2005)).
  4. *Nicholas H.*, 46 P.3d at 932.
  5. *Karen C.*, 124 Cal. Rptr. 2d at 677.
  6. *Kristine Renee H. v. Lisa Ann R.*, 16 Cal. Rptr. 3d 123 (Cal. Ct. App. 2004).
  7. *Elisa Maria B. v. Superior Court*, 13 Cal. Rptr. 3d 494 (Cal. Ct. App. 2004).